S & I Transportation, Inc. *and* Local No. 406, International Brotherhood of Teamsters, AFL–CIO. Case 7–CA–32490

August 31. 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 27, 1993, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, S & I Transportation, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We note that the instant case is distinguishable from *Associated Milk Producers*, 300 NLRB 561 (1990). In that case, we found that the respondent did not violate Sec. 8(a)(5) and (1) of the Act because it gave timely notice to the union of its intent to discontinue its contributions to a pension fund, but the union failed to request bargaining. There, we concluded that, after receiving timely notice of the proposed change, the union's failure to request bargaining constituted waiver of its right to bargain.

Here, however, we agree for the reasons noted by the judge that the Respondent's announcement of the proposed changes was presented as a fait accompli, and that the Union did not waive its right to bargain. Specifically, the Respondent's announcement directly to employees of unilateral action (the change in pay periods from weekly to biweekly) indicates its intent to make changes without bargaining with the Union. The meeting between the Respondent and the Union would not have taken place at all if the Union had not learned from employees of the change in pay periods and if the Union had not threatened to file unfair labor practice charges against the Respondent for unilaterally implementing that change. Finally, the testimony of the Respondent's president, Steven Jones, reveals the Respondent's fixed position to implement the changes as announced. That the Respondent subsequently agreed with the Union's suggestion that the change should be phased in gradually only affected the *timing of the change's implementation*. It did not alter the fact that the change itself was a fait accompli and not negotiable. It was therefore unlawful.

Linda Hammell, Esq., for the General Counsel.
Elizabeth McIntyre, Esq. (Miller, Johnson, Snell & Cummisky), of Grand Rapids, Michigan, for the Respondent.
Ronald Owen, of Grand Rapids, Michigan, Business Agent of the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The sole issue in this unfair labor practice proceeding is whether Respondent S & I Transportation, Inc. bargained in good faith before it reduced the wages of its employees and eliminated and reduced many of their health and welfare and other benefits. The complaint alleges that Respondent did not, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, while Respondent contends that it offered Charging Party Local No. 406, International Brotherhood of Teamsters, AFL–CIO (Union), an opportunity to bargain about whether to put the changes into effect.[1]

Jurisdiction is admitted. Respondent, a corporation with an office and place of business in Grand Rapids, Michigan, has been engaged in the operation of a parcel pickup and delivery service for its sole customer, Airborne Express (Airborne), an overnight delivery service, and thereby has acted as an essential link in the interstate transportation of goods. During 1991 Respondent provided transportation services valued in excess of $50,000 from its Michigan facilities (it had another facility in Lansing, Michigan) directly to customers located outside Michigan, and during the same period it derived gross revenues in excess of $100,000. I conclude that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On May 6, 1991, the Union notified Respondent and Airborne Express that it represented a majority of their employees. The Union mailed a petition for a representation election to the Board's Regional Office that day. Respondent reacted by contacting Airborne and asking for an increase of its rates so that it could raise the wages of its employees and provide them with health and welfare benefits, all in an attempt to ward off the Union drive. The rate increase was granted and Respondent raised the wages of its employees $2 per hour and provided a new welfare program within 2 days of the Union's notice.

The representation election was held on July 2, 1991 (Airborne was dropped as a joint employer), and the Union might have been successful then in being certified, had Respondent not filed sufficient challenges that might have affected the results of the election. A hearing was held on the challenges in August, and a theory of the General Counsel in this proceeding is that Respondent was fairly assured that it would not be successful.[2] So, because the May increases

[1] The relevant docket entries are as follows: The Union filed its unfair labor practice charge on October 16, 1991, and a complaint issued on December 30, 1991, which was amended on June 5, 1992. The hearing was held in Grand Rapids, Michigan, on August 27, 1992, at which a portion of the complaint was settled. The settlement was complied with and pars. 9(a) and (b), 12, and 13 are hereby dismissed.

[2] On March 27, 1992, in *S & I Transportation, Inc.*, 306 NLRB 865 (1992), the Board certified the Union as the exclusive bargaining representative for the following unit:

> All full-time and regular part-time drivers, mechanics, and truck washers employed by S & I Transportation, Inc. at its 4365 40th Street, Grand Rapids, Michigan facility; BUT EXCLUDING dis-

had done nothing to stop the union drive, Respondent decided to take back the increases that it had earlier granted.

So much for the theory, because the complaint alleges only a violation of Section 8(a)(5) of the Act, not Section 8(a)(3). On September 21, 1991,[3] Respondent's president and sole owner, Steven Jones, wrote a memorandum to the employees, stating, in part: ''Due to the cost in the administrative expense of a weekly payroll, S & I Transportation will be processing its payroll bi-monthly.'' This prompted rumors about Respondent's weak financial status and particularly about its failure to pay its medical insurance premium for September. The Union's attorney, by letter dated September 23, threatened to file an unfair labor practice charge for those unilateral changes and to institute a separate legal action for unpaid wages and fringe benefits. He began his letter:

> It is my understanding that you have unilaterally, and without bargaining with the union, changed the employees' wage hold back by extending that hold back an additional two weeks, in violation of MCL 408.472(3)(b), and Section 8(a)(5) of the NLRA. Further, it is my understanding that you have failed to pay the medical insurance premium for September 1990. Although this apparently does not impact employee compensation, we understand that your fuel providers are threatening to put you on a ''cash only'' basis. Finally, there are unsubstantiated rumors that you will be closing up shop without making good on the wages and fringe benefits to your employees in the very near future.

This resulted in Respondent's arranging a meeting with the Union on Friday, September 27. Respondent's attorney, Michael Snapper, opened the meeting by indicating that Respondent was meeting with the Union despite the fact that the Union had not been certified and that Respondent was not waiving its right to contest the Union's status as the employees' collective-bargaining representative. Nonetheless, Respondent was in grave financial condition, and it required the following changes, which would be implemented on the following Tuesday, October 1:

> 1. All employees would work at a single hourly rate, $7.00 per hour. Employees who had been working for more would suffer a reduction.
> 2. Respondent would discontinue paying premiums for life, dental, and disability insurance on October 1. It would continue to pay for health insurance only for October, and the employees had to assume the premiums after that.
> 3. The payroll period would have to be changed from weekly to biweekly.

Snapper explained that Respondent's financial condition necessitated these changes and offered financial statements from Respondent's accountant to support his position. The Union's representatives, Karl Schobey and Ronald Owen, briefly looked at the statements, but immediately dismissed them because they had not been certified and were based on unaudited records given to the accountant. As a result, there was no bargaining about the financial condition of Respondent, but there was some discussion about the change of the payroll period. The Union contended that the change would unfairly deprive the employees of their wages for an additional week and that payment of wages already was delayed for a week or two after the employees had performed their work.

When the meeting ended, Snapper testified, he advised the Union representatives that the changes would be effected, but he would be open to more negotiations, and that changes could be made retroactively. Neither union representative testified that any mention was made of retroactivity, but both confirmed that Respondent offered to meet again. They thought that was of no use, because Respondent had clearly stated its position; and it appeared that its announcement was a fait accompli, and nothing would change it. That, in essence, is the issue: whether the announcement was a fait accompli or whether Respondent offered the Union a reasonable opportunity to bargain about whether the changes should be made.

Part of what the General Counsel relies on is the testimony of the two union representatives that Snapper announced at the beginning of the meeting that he was ''not there to bargain.'' Schobey was a particularly unimpressive witness. He seemed to recall hardly anything about the meeting, and what he recalled was mostly vague, with the one salient exception of this particular statement, which he remembered as if it were imprinted in his brain. Owen was better. His recollection of Snapper's statement was identical to Schobey's testimony; and I found that, with Schobey's general lack of any recollection, the statement must have been carefully discussed between the two.

I find that it was not said. Snapper has been involved in labor law for many years, and I am convinced that he knew that he had certain obligations under the Act, one of them being that an employer risks a violation of the Act for unilaterally changing terms and conditions of employment after a representation election, if the union is ultimately certified. *Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974). I find it utterly improbable that he would have openly stated that he would not bargain, particularly because he would be well aware that the law does not require that employer to accede to the Union's wishes. All that the Act requires is that he bargain in good faith and, as an experienced counsel, he would know how to comply with the Act. Furthermore, as the General Counsel's brief suggests, the reason for the meeting was in response to the Union's threat that it would file an unfair labor practice charge if Respondent made changes unilaterally and without bargaining. Therefore, at the very least, Snapper had to make it appear that he was bargaining in good faith and complying with the Act. For that reason, he brought Respondent's accountant and distributed financial statements to support Respondent's position.

Snapper's actions after the meeting are consistent with these findings. On October 1, he wrote to Schobey agreeing that Respondent would not change the payroll period to biweekly immediately, but would make the change gradually. In addition, he confirmed what had transpired at the meeting. His letter comports in all respects with his testimony. At no time did he write that he was not bargaining with the Union. Rather, he encouraged the Union to advise him if its representatives had any questions, or wished to meet, or wished to be supplied with additional information. He prepared his

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patchers, and guards. professional employees and supervisors as defined in the Act.

[3] All dates refer to 1991, unless otherwise stated.

letter 2 weeks before the unfair labor practice was filed, so there was no effort to tailor his letter to meet the allegations of the complaint (although, admittedly, he might have tailored his letter to counter the letter sent by the Union's counsel). His later letter, on December 5, again inviting further bargaining, could be subject to that criticism; but it is consistent with his precharge position and his testimony.

Merely because Snapper did not openly announce that he was not going to bargain with the Union does not mean that the reduction was not a fait accompli and that the meeting was anything more than a ruse to give the appearance of bargaining, while not actually doing so. There is no question that Respondent decided what it needed to do, long before the meeting was held. The meeting would not have even been held, had not the Union written to Respondent threatening to take legal action. The Union's letter was its response to Respondent's distribution of a notice stating that it was going to change from a weekly to a biweekly payroll. That announcement of a unilateral action demonstrates that Respondent was unmindful of its duty to bargain collectively and indicates that it intended to lower wages and eliminate benefits without consultation with the Union. When threatened by the Union, however, Respondent had to change course and schedule a meeting. Notwithstanding Snapper's words, it was clear that Respondent had no intention of changing its views. Steven Jones, Respondent's president and sole owner, testified that the meeting was held ''to substantiate to the [U]nion why certain actions were going to be taken'' and: ''[W]e told them what we were going to do about changing from weekly to biweekly.'' The meeting was not to negotiate but to advise. Jones testified: ''And we weren't there very long. We gave them the documents. We told them our situation and left. A pretty straight forward deal.''

Thus, despite the fact that Snapper did not say that he was not there to bargain, the impression received by the Union representatives was accurate. Respondent told them its position and left. It was a done deed. Respondent contends that, even if it was, when there are compelling economic reasons for taking action, an employer does not have to bargain with the union before making a change. But, assuming there is some authority for that proposition, it is only dicta. *Venture Packaging*, 294 NLRB 544 fn. 2 (1989), citing *Mike O'Conner Chevrolet*, 209 NLRB at 703. Furthermore, the Board has never stated what an employer must prove; and, here, Respondent proved nothing, because it did not offer the statement of its financial condition for its truth.

As a result, Respondent was required to bargain about its intended changes. Part of that obligation involves timely notice to the Union of any changes. In *Intersystems Design Corp.*, 278 NLRB 759 (1986), the Board quoted with approval from an administrative law judge's decision in *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982), as follows:

> The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli.

Here, Respondent set the meeting with the Union on a Friday before the Tuesday on which it threatened to make all the changes. That was two business days' notice to the Union and was not reasonable, particularly because by September 21, it had made the decision to pay wages biweekly, presumably on the same basis that it made its decision to reduce wages. Because the notice was too short, it was ''nothing more than informing the [U]nion of a fait accompli.'' Ibid. Contrary to Respondent's contention that the Union, by failing to object, waived bargaining, I conclude, as did the Board in *Intersystems Design*, above at 760, ''[T]he Union cannot be held to have waived bargaining over a change that was implemented without timely notice.'' There, the Board relied on *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983), which found:

> It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli. . . . ''An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.'' . . . Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.

Respondent contends that it gave the Union a chance to bargain even after Respondent implemented its decision and that, if the Union presented convincing arguments, the implementation could be changed retroactively. However, Respondent's obligation to bargain is one that must take place before it implements the change. Once Respondent unilaterally implemented the changes without bargaining, it violated the Act. The violation must first be remedied before the Union should be required to bargain. Respondent cites no decision placing the onus on the Union (under penalty of dismissal of an unfair labor practice complaint), when it refuses to bargain to rescind an illegal, unilateral implementation.

Respondent announced the change of its pay schedule in advance of the September 28 meeting. There was no bargaining on that issue, except for the Union complaint that the new schedule would delay the payment of the employees' wages several weeks after they had been earned. The mere fact that Respondent later acceded partially to the Union's objection does not indicate that there was bargaining. Rather, for whatever reason, Respondent altered what was its previously announced decision, which had been made and announced before it consulted with the Union.

In sum, I conclude that Respondent presented the Union with a fait accompli in violation of Section 8(a)(5) and (1) of the Act and that the Union did not waive its right to bargain.[4]

[4] Needless to state, there was no bargaining here because Respondent presented a fait accompli. As a result, there could be no impasse in bargaining within the meaning of *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to return the terms and conditions described above to the status quo ante and make the unit employees whole for loss of wages and other benefits they may have suffered by reason of Respondent's unilateral changes, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also reimburse employees for the costs they incurred, such as payments to health care providers and third-party insurers, because of Respondent's failure to pay premiums for life, dental disability, and health insurance on their behalf.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, S & I Transportation, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reducing the wages of its unit employees, eliminating their insurance coverage, or changing its payroll period from weekly to biweekly.

(b) Making changes to its terms and conditions of employment unilaterally and without giving Local No. 406, International Brotherhood of Teamsters, AFL–CIO, a meaningful opportunity to bargain about whether to put the foregoing changes into effect.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate all terms and conditions of employment of its employees as they were on September 30, 1991.

(b) Make whole its unit employees for any loss of earnings and other benefits suffered as a result of its unilateral changes, in the manner set forth in the remedy section of this decision.

(c) Reimburse its employees for any costs they incurred, such as payments to health care providers and third-party insurers, because of its failure to pay premiums for life, dental, disability, and health insurance on their behalf.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Grand Rapids, Michigan, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT reduce the wages of our unit employees, eliminate their insurance coverage, or change our payroll period from weekly to biweekly.

WE WILL NOT make changes to our terms and conditions of employment unilaterally and without giving Local No. 406, International Brotherhood of Teamsters, AFL–CIO, a meaningful opportunity to bargain about whether to put the foregoing changes into effect.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate all terms and conditions of employment of our employees as they were on September 30, 1991.

WE WILL make whole our unit employees for any loss of earnings and other benefits suffered as a result of our unilateral changes.

WE WILL reimburse our employees for any costs they incurred, such as payments to health care providers and third-party insurers, because of our failure to pay premiums for life, dental, disability, and health insurance on their behalf.

S & I TRANSPORTATION, INC.